FEB 11 1949
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

Term, 194 . No. 484

JOSEPH C. SHARBLE,
Petitioner,

vs.

KUEHNLE-WILSON, INC.,
Respondent,

CHARLES HOOKER,
Petitioner,

vs.

KUEHNLE-WILSON, INC.,
Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA AND SUPPLEMENTAL APPENDIX.

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REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA AND SUPPLEMENTAL APPENDIX.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The brief of respondents, in opposition to the petition for certiorari in this case, (1) questions the timeliness of the filing of the petition; and (2) makes the point that petitioners had not raised federal questions prior to the filing of the supplemental petition for re-argument in the Supreme Court of Pennsylvania.

Since the filing of the respondent's brief before this Honorable Court, the Chief Justice of the Supreme Court of Pennsylvania has signed an order amplifying and explaining its prior order of October 1, 1948, in the following terms:

> "ORDER
>
> AND NOW, this 4th day of February, 1949, this Court, *nunc pro tunc*, amplifies and amends its Order of October 1, 1948, to read as follows:
>
> 'AND NOW, this first day of October, 1948, the questions of law raised in the supplemental petition for reargument having been considered on the merits, the petition for re-argument is refused.'
>
> /s/ GEORGE W. MAXEY,
> GEORGE W. MAXEY,
> Chief Justice."

A copy of this order, as certified by the Prothonotary of the Supreme Court of Pennsylvania, has been filed with the Clerk of the Supreme Court of the United States. This order was signed by the Chief Justice of the Pennsylvania Supreme Court pursuant to a petition which stated, *inter alia*, the following:

> "That your petitioner believes that the Court gave serious and studied consideration to the petition for re-argument, on its merits, and that it did consider the important questions of constitutional law there raised."

It is submitted that the quoted amplification of the order of the Pennsylvania Supreme Court, especially in the light of the quoted averments in the petition asking for such

amplification, shows beyond question that the Supreme Court of Pennsylvania actually considered, *on the merits*, the constitutional questions involved in the present petition for certiorari. It was not until October 1, 1948, that the Supreme Court of Pennsylvania rendered an adverse decision on the merits, with respect to these constitutional questions. The petition for certiorari to the Supreme Court of the United States was filed in this case on December 28, 1948, clearly within the ninety-day period provided by law.

It is true, as suggested in respondent's brief, that after the denial of a re-hearing by the court below, the losing party may not extend the period for seeking certiorari by the expedient of filing additional requests for a re-hearing. However, if in fact the court below considers new motions on the substantive issues raised, and arrives at a conclusion *on the merits* thereof, then the petitioners are entitled to that extra period of time—between the filing of the petition and the time when it is ruled upon—as an extension of the date from which the petition for certiorari must be filed with this Court.

That our position is correct, may be found by the literal reading of the opinion of this Court in GYPSY OIL CO. v. ESCOE, 275, U. S. 498, 567; 48 S. Ct. 112, 113 (1927), where it said:

> "If, however, a timely motion for leave to file the second petition is granted and the petition is actually entertained by the court, then the time within which application may be made here for certiorari begins to run from the day when the court denies such second petition."

It is also true, as suggested by respondents, that petitioners did not raise the federal questions below until the filing of the supplemental petition for re-argument. To this, however, two answers may be made. In the first place, regardless of when the questions were raised, the fact remains that the Supreme Court of Pennsylvania did con-

sider the constitutional law questions presented in that petition. In the second place, it would have been impossible for the petitioners to raise these constitutional issues prior to the Pennsylvania Supreme Court's reversal of the trial court, since it was *that opinion* of the Supreme Court which, for the first time, created the constitutional questions now raised in this case.

It is respectfully submitted, therefore, that respondent's objections as to the timeliness of this petition for certiorari are not well founded, and that this Honorable Court should consider this case on the merits.

With respect to the merits, petitioners ask leave to direct the attention of the Court to the following principle announced by Mr. Justice Frankfurter, concurring in SNOWDEN v. HUGHES, 321 U. S. 1, 16; 64 S. Ct. 397, 405:

> "* * * And if the highest court of a state should candidly deny to one litigant a rule of law which it concededly would apply to all other litigants in similar situations, could it escape condemnation and therefore a denial of the equal protection of the laws? See Backus v. Fort St. Union Depot Co., 169 U. S. 557, 571, 18 S. Ct. 445, 451, 42 L. Ed. 853."

It is respectfully submitted that this quotation points up, in a nutshell, the constitutional question involved in this case.

Respectfully submitted,

ALBERT S. HERSKOWITZ,
GEORGE H. DETWEILER,
RICHTER, LORD & FARAGE,
By: B. NATHANIEL RICHTER,
Counsel for Petitioners.

Supplemental Appendix

IN THE
SUPREME COURT OF PENNSYLVANIA.
EASTERN DISTRICT.

JOSEPH C. SHARBLE,
v.
KUEHNLE-WILSON, INC.,
Appellant.

No. 74, January Term, 1948.
Appeal from Court C. P. No. 4 (Tried in No. 7) of the County of Philadelphia.

PETITION TO AMEND ORDER NUNC PRO TUNC.

(In Appeal No. 74.)

The petition of Joseph C. Sharble, by his attorneys, Richter, Lord & Farage, respectfully represents:

1. That on August 4, 1948, your petitioner did file before this Court a Petition for Leave to File Supplemental Petition for Re-Argument, together with such Supplemental Petition for Re-Argument.

2. That on October 1, 1948, this Court entered the following orders:

"Prayer of petition refused. Per curiam."
"Re-argument refused. Per curiam."

3. That the said orders are not sufficiently clear as to whether or not the petition for re-argument was considered

on the merits, so as to determine the period within which the petition for writ of certiorari must be filed with the Supreme Court of the United States.

4. That your petitioner believes that the Court gave serious and studied consideration to the petition for re-argument, on its merits, and that it did consider the important questions of constitutional law there raised.

WHEREFORE, your petitioner prays that the orders of October 1, 1948, be now amplified so as to clearly inform the Supreme Court of the United States of the nature of the orders entered by this Court on October 1, 1948.

And he will ever pray.

RICHTER, LORD & FARAGE,
By:

Counsel for Petitioner.

IN THE
SUPREME COURT OF PENNSYLVANIA.
EASTERN DISTRICT.

CHARLES HOOKER,

v.

KUEHNLE-WILSON, INC.,
Appellant.

No. 75, January Term, 1948.
Appeal from Court C. P. No. 4 (Tried in No. 7) of the County of Philadelphia.

PETITION TO AMEND ORDER NUNC PRO TUNC.

(In Appeal No. 75.)

The petition of Charles Hooker, by his attorneys, Richter, Lord & Farage, respectfully represents:

1. That on August 4, 1948, your petitioner did file before this Court a Petition for Leave to File Supplemental Petition for Re-Argument, together with such Supplemental Petition for Re-Argument.

2. That on October 1, 1948, this Court entered the following orders:

> "Prayer of petition refused. Per curiam."
> "Re-argument refused. Per curiam."

3. That the said orders are not sufficiently clear as to whether or not the petition for re-argument was considered on the merits, so as to determine the period within which

the petition for writ of certiorari must be filed with the Supreme Court of the United States.

4. That your petitioner believes that the Court gave serious and studied consideration to the petition for re-argument, on its merits, and that it did consider the important questions of constitutional law there raised.

WHEREFORE, your petitioner prays that the orders of October 1, 1948, be now amplified so as to clearly inform the Supreme Court of the United States of the nature of the orders entered by this Court on October 1, 1948.

And he will ever pray.

RICHTER, LORD & FARAGE,
By:
Counsel for Petitioner.

IN THE

SUPREME COURT OF PENNSYLVANIA.

EASTERN DISTRICT.

JOSEPH C. SHARBLE, v. KUEHNLE-WILSON, INC., Appellant.	No. 74, January Term, 1948. Appeal from Court C. P. No. 4 (Tried in No. 7) of the County of Philadelphia.

ORDER.

(In Appeal No. 74.)

AND NOW, this 4th day of February, 1949, this Court, *nunc pro tunc*, amplifies and amends its order of October 1, 1948, to read as follows:

"AND NOW, this first day of October, 1948, the questions of law raised in the supplemental petition for re-argument having been considered on the merits, the petition for re-argument is refused."

GEORGE W. MAXEY,
Chief Justice.

IN THE

SUPREME COURT OF PENNSYLVANIA.

EASTERN DISTRICT.

CHARLES HOOKER, v. KUEHNLE-WILSON, INC., Appellant.	No. 75, January Term, 1948. Appeal from Court C. P. No. 2 (Tried in No. 7) of the County of Philadelphia.

ORDER.

(In Appeal No. 75.)

AND NOW, this 4th day of February, 1949, this Court *nunc pro tunc*, amplifies and amends its order of October 1, 1948, to read as follows:

> "AND NOW, this first day of October, 1948, the questions of law raised in the supplemental petition for re-argument having been considered on the merits, the petition for re-argument is refused."

GEORGE W. MAXEY,
Chief Justice.